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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 672

H. B. NELSON CONSTRUCTION COMPANY,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 672

H. B. NELSON CONSTRUCTION COMPANY,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

The petitioner, H. B. Nelson Construction Company, prays that a writ of certiorari to review the judgment of the Court of Claims in the above entitled case be granted.

Opinion Below.

The opinion of the Court of Claims is not yet officially reported (R. 18-22).

Jurisdiction.

The judgment of the Court of Claims was entered June 3, 1940. A motion for a new trial was overruled on October 7, 1940 (R. 23). The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

Questions Presented.

1. Did the court below have jurisdiction to dismiss the petition upon findings for which there is no basis?

2. Was the court's failure and refusal to make special findings of fact requested by petitioner, which are facts upon vital questions and indispensable elements in the case, a violation of this Court's Rule 41?

3. Are the findings of the court below sufficient to sustain judgment for respondent in view of the undisputed facts set out below?

4. Did the court below err in assessing liquidated damages against petitioner?

5. Is petitioner entitled to judgment for the amount asked by him upon the undisputed evidence in the case?

Statement.

Facts Not Disputed.

This case arose out of a contract between petitioner and respondent for constructing concrete foundations for three 300-foot and six 600-foot radio towers, at the Naval Radio Station, Summit, Canal Zone, in accordance with designated specifications and drawings, for the consideration of $47,816, the work to be commenced within ten days after date of receipt of notice to proceed, which was received on July 24, 1934. The foundations for the 300 foot towers to be completed within 45 days and the 600 foot towers within 75 days from the date of receipt of notice to proceed, making the completion dates September 7, 1934, for the 300-foot towers, and October 7, 1934, for the 600-foot towers. The 300-foot tower foundations were completed within the agreed time.

Prior to the bids, respondent made a survey of the site and probings with a pointed rod to determine the nature of

the subsoil controlling the need of piles, and their length, and made a log of these probings. The project is located alongside the Panama Canal, the nearest tower about 2,200 feet from the Culebra Cut (R. 12-15; Court Findings Nos. 1, 2, 3, 4).

Petitioner's representative, along with other representatives of prospective bidders, made an examination of the site of the proposed work in May, 1934, previous to petitioner's bid. The inspection trip was conducted by respondent's officer in charge of the work. It had rained the night before, and there were a few inches of water in some of the depressions (R. 34-35). The heavy rains do not occur there until October (R. 28-29).

All the tower sites had growing on them dense guinea grass 6 to 8 feet high. Respondent's representative had a trail cut through the grass, and led the party around the edge of the site (R. 35, 43). You would get lost if you tried to go any distance through the grass, and it was tall and coarse, and difficult to get through (R. 42).

Respondent's representative told the bidders that the Panama Canal was extending its drainage system there (R. 36, 43).

In addition to the drainage ditches, roads extended around the side of Tower 4, and there was a water line and a railroad spur coming into the site (Deft's. Ex. T).

Petitioner's representative, Gillogly, testified that respondent's representative, Commander Fogg, told him, during the inspection, that main new drainage ditch, which he pointed out, was put in for the drainage of the area, and lateral drainage ditches were then being opened by the Drainage Division of the Panama Canal (R. 23); that the site would be free from water because of these drainage ditches (R. 25).

Commander Fogg testified:

(a) That during the inspection trip he did not tell Gillogly that the area would be drained by the ditches and free from water; that he offered the bidders no opinions (R. 36).

(b) That he invited the attention of the bidders to the fact that the Panama Canal was extending their ditching system in there, but offered no opinions (R. 36, 43).

(c) He had been over it a number of times and knew that the site was in a marsh, an old lake bed, with drainage ditches, but not a thoroughly drained site, but he "ventured no information on it" (R. 39).

(d) That he knew it would be a difficult place to work in (R. 38, 43).

(e) That he knew that the area was near the slides that they had been having trouble with in the Panama Canal, and as several of the slides were adjacent to the site the drainage ditches were built to release *Flood Waters* so they would not stand there and soak up the soil and make more slides, and to take off the *Flood Waters* within a reasonable time; that he did not know when the first inspection trip was made whether the drainage system was adequate to take off the flood waters within a reasonable time. That it was a matter of the bidder's own responsibility, and that he was only responsible for showing the bidders the sites and conditions (R. 39-40). That the difference in the contract area from that when the inspection trip was made in May, until November, was that the heavy rains would come up and *flood the site* (R. 39).

The effect of the drainage ditches on the subsoil was not apparent on the inspection trip. (Finding 4; R. 14-15.)

Par. 7 of the General Provisions provides that,—

> "They" (the bidders) "will be furnished with such additional information as is available by the local Government representatives". (Plf's. Ex. 3.)

Previous to the bid, respondent furnished petitioner with a map, Plf's. Ex. 5 and Deft's. Ex. T, which showed drainage ditches, elevations, and the locations of the tower sites. This map did not contain symbols or indications showing swamps, or that the tower sites, 3 to 6, inclusive, were in a swamp and marsh. (Plf's. Ex. 5; R. 24.)

Section 2-01 of the Specifications provided,—

> *"that no artificial obstructions will be encountered"*. (Plf's. Ex. 2.)

Article 9 of the Contract provides that,—

> "* * * the contractor" (shall not be) "charged with liquidated damages in the completion of the work * * * due to floods". (Plf's. Ex. 1.)

Addendum 2 of the Specifications gave the length of the piles to be driven at towers 3, 5, and 6. (Plf's. Ex. 2.)

Petitioner relied, in making his bid, on his inspector's report of the site, on the maps furnished him, and upon the contract, General Provisions, and Specification Agreements (R. 27).

Although the notice to proceed with the contract work was not received by petitioner until July 24, 1934, and he was not required to commence work until August 3, 1934, ten days after said notice was received (Court's Finding No. 2; R. 12, Plf's. Ex. 1), he began clearing the site July 5, 1934, and started excavations for the 300-foot towers on July 18, 1934. (Deft's. Ex. Y.)

After petitioner placed his machinery on the site and began excavation at Foundation No. 1, respondent on July

27, 1934, had him make a soil bearing test because respondent knew that the soil had been excavated from the Panama Canal, and was not sure of its bearing value (R. 32), even though respondent was familiar with the site (R. 39), and had made a soil test to determine the length and number of the piles in order for the contractors to make their bids (R. 32).

The rainy season starts in gradually in May, becomes greater in June, lets up a little in July, gets heavier in August, and increasingly so in September, October, and November (R. 28-29).

Petitioner, during the progress of the work, found the soil conditions at the sites of towers 3, 4, 5, and 6 materially worse for doing the work than those contemplated under the contract, and represented by respondent, and then it was possible to see on the inspection trip previous to the bid,—

(a) Floods resulted from inadequate culverts (not shown on the maps furnished petitioner previous to his bids) which created an artificial obstruction by damming and backing up the water, and flooding the site (R. 24). The main ditch emptied through the culvert and that was the only way the water could drain from the site (R. 24). The culvert was higher than the surrounding ground (R. 26). The general engineering practice is to build culverts larger than necessary for average conditions, while this culvert was built to carry off water under average conditions (R. 31).

(b) The drainage ditches (shown on the map furnished petitioner previous to his bid, and pointed out to the inspection party by respondent's representative when he stated they were being extended by the drainage division (R. 36, 43)) proved to be inadequate, and not extended sufficiently to drain the site (R. 24-26). They were originally built

to release the *flood waters* so they would not stand there and soak into the soil, and increase the slides adjacent to the site (R. 39-40, 43). Petitioner found that tower No. 6 would be entirely submerged and flooded with water, which would take a day or two to drain (R. 26, 29), and that 80% of the time spent in constructing those foundations was lost on account of water conditions (R. 24); that it was necessary to operate pumps constantly during the entire period of construction at towers 3, 4, 5, and 6, and in some cases day and night (R. 24); that pumps were used 2086 hours, 260 eight-hour days (Deft's. Ex. Y); that water was on the surface 60% of the time at tower No. 4 (R. 24).

(c) Water and mud constantly flowed into the holes (R. 25-26) faster than it could be pumped out (Deft's. Ex. Y of Oct. 1, 1934), and flooded the site several feet above the tower foundations, and the lower part 12 to 15 feet deep (R. 26). In September, 1934, petitioner's men would sink up to their waists in the mud trying to hand up the mud, a bucketful at a time, and it was hard to make any progress (R. 25).

(d) Petitioner was mired half the time in transporting materials (R. 25). You could not get the machines to the site or work except on 24 x 30 foot mats, and you had to corduroy to get across. You could not work long before you had to move (R. 28).

(e) Roads built washed out, necessitating rebuilding. Due to the floods and undrained condition of the site, 3600 lineal feet of extra roads were required (R. 25, 28) which were difficult and expensive to construct, and had to be routed around the site for about 3000 feet, because the site was impassable (R. 25, 26, 28).

(f) Petitioner could not use his clamshell or excavating shovel during and after the rains, but had to employ extra

men to bail the water and mud out by hand, or use a barrel with the shovel to pull it out (R. 26, 28).

(g) The soil was not workable, trebling the cost at No. 6 (R. 26).

Several months after the work started, respondent gave petitioner a map, Plf's. Ex. 6, made before the bids were received, which showed swamps in the vicinity of the site. The swamps were not shown on the map, Plf's. Ex. 5, furnished petitioner previous to his bid (R. 24).

The specifications called for 180 piles in towers 3, 5, and 6, and designated the length of the piles at the three footings of each tower site. Tower 6-C required 20 pilings to be driven to a depth of 10 feet each. On September 22, 1934, the first pile was driven, but would not take up the required bearing. A 17½ foot pile was driven with the same result. So, the work was stopped. On September 26th a 27 foot pile was driven, which was satisfactory. All of the 20 piles had to be increased in length (R. 32).

Out of the 180 piles required on the three tower foundations, 91, or over 50%, were required by respondent to be increased in length (R. 31). As a result of the increase in the length of the 91 piles, all the piling had to be interchanged at the three sites, and additional piles had to be ordered from the United States, which arrived (after the original contract time had expired (R. 25, 26, 31), on November 20, 1934 (R. 31), causing a delay of over three weeks (R. 26, 31)).

As late as October 4, 1934, respondent wrote petitioner that in order to determine the length of piles needed at foundations Nos. 3 and 5, test piles were to be driven at these sites, and that he could obtain four 75 foot piles for that purpose, and two others could be obtained by splicing;

that the estimated pile lengths to be needed to be increased were (R. 33):

	Original.	Test Pile Length.
3-A	17 feet	37 feet
3-B	21 "	41 "
3-C	18 "	38 "
5-A	27 "	47 "
5-B	22 "	42 "
5-C	18 "	38 "
	123	243

Pilot piles were driven at towers 3, and 5, and respondent decided not to make additional tests (R. 32).

Petitioner's work would have been done with greater dispatch and less trouble if the site had been adequately drained, and his headway was greatly impeded because of the swampy, boggy site (R. 27, 42).

Respondent kept an inspector on the job the entire time the work was in progress, whose duty it was to inspect the site each day, and to report in writing all matters of consequence as to the work, and, among other things, any instance where the contractor retarded the progress of the work. (Deft's. Ex. Y.) These daily reports were accurate and correct (R. 29).

Davies, respondent's Civil Engineer, charged plaintiff with certain delays on specified parts of the work, but did not claim that petitioner was not engaged on other parts of the work during the periods specified (R. 33). Respondent's Daily Reports do not charge petitioner with retarding the progress of the work during the periods specified. (Deft's. Ex. Y.)

Petitioner employed enough men on the job, and employed as many as he could for the work (R. 37). He had to employ extra men to bail and excavate where he could not use his shovel (R. 26, 25, 28).

The necessary cost of construction work was	$67,996.38
A profit of 10% is	6,799.64
The cost of a bond would be	1,121.94
Total due petitioner	$75,917.96
Paid by respondent	49,121.42
Leaving unpaid	$26,796.54

(R. 27; Plf's. Ex. 7).

The additional prices allowed by the change orders covered only the additional cost of work and material made necessary by the changes, and included nothing for the additional cost in the general work caused by these changes through the delays which ensued, for which plaintiff was not responsible. (Change Orders A and B; Deft's. Exs. A, B, and C.)

Petitioner was charged with 31 days delay because of the buckling of the sheet piling; with 10 days' delay while a shovel was mired; and with other delays, but none of them are charged in the reports (Deft's Ex. Y).

Petitioner, in July, 1934, when the specifications showed that foundation piles only 10 feet long were needed at tower 6-C, drove sheet piling there, which buckled. Tests made by respondent September 26, 1934, showed that far longer piles were needed. The buckling was inevitable as the piles at a 10 foot depth had no substantial foundation to rest on (R. 25, 29, 31). Respondent's mistake in the specifications of 10 feet involved petitioner in both loss of time and added expense. (Id.)

Petitioner's shovel slid off a mat into the mud November 8th. Every effort was made for 10 days to pull it out with the equipment on hand, but without being able to move it. Petitioner then brought in another shovel and pulled the first one out. While the shovel was mired, petitioner was

doing work at other places, and the inspector did not charge any delay for the miring. (Deft's. Ex. Y; R. 24, 33.)

Petitioner signed the change orders and release because he had to have pay for his men and for material and the officer in charge notified him: "No change order no money" (R. 37). Respondent refused to make payments unless petitioner accepted them in full, over petitioner's protest (R. 26, 27). Petitioner repeatedly complained of conditions and the Government agent's arbitrary action and asked for an extension of time and additional compensation, and appealed to the Secretary of the Navy (Deft's. Ex. H; R. 26, 27). The Government took no action, but 35 days after the work was completed refused to make payments unless accepted in full for specific work listed under the contract and the Change Orders, in which delays were not mentioned (R. 26, 27; Deft's. Exs. B and C).

Specification of Errors to be Urged.

I.

Petitioner urges that the Court of Claims erred in failing and refusing to find the following Findings of Fact requested by petitioner, viz.:

(1) It exhibited a map, Plf's. Ex. 5, which did not show, and from which petitioner could not see, that the sites of towers 3, 4, 5, and 6 were swampy and marshy (R. 24; Plf's. Ex. 5), although respondent had made and had another map showing that the vicinity was swampy (Plf's. Ex. 6; Fogg, R. 37), which was not shown petitioner until 3 months after the work was started (R. 24).

(2) In May, 1934, before the heavy rains, which start in October, an inspection trip was made by Public Works Officer Fogg who led the party around the edge of the swamp, on a trail cut through dense grass 6 to 8 feet high which

covered the site, not venturing on the marshy ground or any of tower sites 3 to 6 inclusive (Fogg R. 35, 43; Court's Finding 4; R. 15).

(3) The map shown petitioner showed the site as having drainage ditches (Deft's. Ex. T and Plf's. Ex. 5; Fogg 38), and Fogg stated that the Panama Canal was extending its drainage system there (Fogg, R. 36, 43).

(4) That Fogg, the officer in charge, knew but did not tell petitioner (R. 36, 43).

(a) That the ditches were to take off the *Flood Waters* and prevent slides, which had occurred frequently (R. 39, 40);

(b) That they would not drain the water that soaked into the soil (Id.);

(c) That the site would be difficult to work in (R. 38, 43), with inadequate drainage (R. 39, 40, 43), and would collect waters, and be flooded (Id.); and

(d) Fogg, although he knew the amount of rainfall, testified that if the bidders wanted information as to the rainfall they could get it themselves as best they could (R. 41).

(5) Petitioner relied in making his bid on Gillogly's report, on the map furnished him (Plf's. Ex. 5), and on the specifications and agreements of the contract (R. 27).

(6) The length of 91 out of 180 piles were erroneously estimated in the specifications (R. 31); piles at three sites had to be exchanged (R. 25); at one site they were so much longer than specified that new piles had to be ordered from the United States (R. 25, 26, 31), causing a delay until six weeks beyond the contract completion time (R. 12, 31); the

exchange of piles was over swampy ground, taking a long time and being difficult and expensive (R. 25, 26).

(7) The specifications provided—

> "Bids shall be based on the following: That no artificial obstruction will be encountered" (Plf's. Ex. 2).

The culverts were built only to carry water under average conditions, whereas the general engineering practice is to build a culvert larger than necessary for average conditions (R. 31); the bottoms of the culverts were higher than those of the ditches and than the surrounding ground (R. 26), which caused the water to back up and flood the site, and was an artificial obstruction to drainage (R. 24, 26); water remained 2 feet above the ground surface 12 hours at a time (R. 26, 29); the site was so flooded that it was necessary to use pumps 2086 hours, 260 eight-hour days (Deft's. Ex. Y; —).

(8) Fogg told the bidders that the main ditch was put in for drainage of the area (R. 23); would be adequate to take care of the water (R. 23), and other lateral ditches were being opened (R. 26, 43), and that petitioner would have a workable site (R. 23).

(9) The contract provides (Plf's. Ex. 1)—

> "* * * the contractor" (shall not be) "charged with liquidated damages because of any delays in the completion of the work due to * * * floods * * *." (Contract, Art. 9).

(10) Petitioner found, at towers sites 3, 4, 5, and 6—

(a) The ditches and culverts inadequate (R. 24, 26, 29, 39, 40);

(b) Floods resulting from the inadequate culverts impeded, hindered, and delayed the work, making it almost

impossible, as the men were up to their waists in mud (R. 25);

(c) Water and mud constantly flowed into the holes faster than it could be pumped out (Deft's. Ex. Y) several feet above the footings and the lower part 12 to 15 feet deep (R. 25, 26);

(d) Following rains, the surface was submerged for a day (R. 26, 29);

(e) The soil was not workable, trebling the cost (R. 26);

(f) You could not get the machines to the site of the work there except on mats, or work long before you had to move (R. 28);

(g) Roads built washed out, necessitating rebuilding (R. 25, 28);

(h) Trucks mired and it took 10 or 12 men to get them out (R. 28);

(i) Petitioner was mired half the time in transporting materials, which some times required unloading trucks or getting other trucks to pull them out, or carrying the material by hand (R. 25, 28);

(j) Extra men had to be used in excavation, as a steam shovel could not be used (R. 26) or the mud had to be taken out with a barrel from a crane, as you could not dig it with a clamshell (R. 28);

(k) There was always trouble at No. 6 in moving equipment in and out due to mud and water, and the roads washing out, and requiring mending (R. 24-26).

(11) Respondent advised petitioner in October 1934 that it intended to make new tests at towers 3 and 5, as it had found the original length at No. 6 was erroneous, (but later

determined that new tests at 3 and 5 were unnecessary (R. 32, 33).

(12) Respondent drove piling piles at foundations 3 and 5 to determine the bearing value of the soil early in October 1934 (R. 32).

(13) Taking piles from No. 5 required new piles for it from the United States, which were ordered promptly, but did not arrive until November 20th, whereby respondent delayed completion six weeks beyond the original contract time (R. 25, 26, 31).

(14) The work would have been done with greater dispatch and less trouble had the site been adequately drained, and petitioner's headway was greatly impeded because the site was swampy and boggy (R. 25, 27, 42, 45, 46).

(15) Petitioner would have completed the job in the contract time if the site had been such as respondent represented, and if the agreement that there would be no artificial obstructions had not been broken through improperly constructed and inadequate culverts and floods caused thereby (R. 25, 27).

(16) Respondent kept an inspector on the job all the time the work was in progress to inspect the site each day, and report in writing all matters of consequence as to the work. Respondent put the reports in evidence and proved that they are accurate and correct (Deft's. Ex. Y; R. 29).

The inspector's report fails to show that petitioner was chargeable with any delays in the progress of the work (Deft's. Ex. Y).

Davies charged petitioner with certain delays on specific parts of the work, but the reports show that during these times petitioner was engaged on other parts of the work, and Davies does not claim that petitioner was not so engaged (Deft's. Ex. Y; R. 33).

Only the following time was taken to repair equipment during the 7 months the work was in progress, viz—

Concrete mixers, parts of 6 days—mostly very small parts; pile and sheet driver and shovel very small parts of 5 or 6 days (Deft's. Ex. Y).

(17) Petitioner had enough men on the job (R. 37).

(17-a) Towers 3, 4, and 5, as to which only delays are claimed had not been used for 3½ years after the work had been completed. They have not been used yet. An attempt was made in 1936 to use them, but it was abandoned. No proof was made of damages through failure to complete these towers on time (R. 34).

(17-b) The necessary cost of construction work was $67,996.38
A profit of 10% is 6,799.64
The cost of a bond would be 1,121.94

Total due petitioner $75,917.96
Paid by respondent 49,121.42

Leaving unpaid $26,796.54,

for which petitioner is entitled to judgment (R. 27; Plf's. Ex. 7).

(18) The additional prices named in the change orders and paid covered only the additional cost of work and material made necessary by the changes set out in said orders, and included nothing for the additional and extra cost in the general and other work caused by and directly resulting from these changes and the unforeseen difficult nature of excavating for and constructing the tower foundations, causing the delays which ensued, and the increased cost, for which petitioner was in no wise responsible (Deft's. Exs. A, B, C, and G).

(19) Petitioner was charged with 31 days' delay because of the buckling of the sheet piling; with 10 days' delay

while a shovel was mired; and with other delays, but none of them are charged in the reports (Deft's. Ex. Y).

(20) Petitioner drove sheet piling at foundation 6-C, relying on respondent's specifications estimate that only 10 foot foundation piles were needed there (Plf's. Ex. 2), but further tests showing longer piling necessary were made September 26, 1934 (Deft's. Ex. Y).

Respondent did not suggest a rectangular instead of a circular form of sheet piling until after the piling caved in (R. 30, 31), which was not caused by the form of driving the sheet piling, but by respondent's erroneously showing that only 10 foot foundation piling were needed (R. 25, 32; Plf's. Ex. 2).

Petitioner's shovel slid off a mat into the mud November 8th. Every effort was made for 10 days to pull it out with the equipment on hand, but without being able to move it. Petitioner then brought in another shovel and pulled the first one out. While the shovel was mired, petitioner was doing work at other places, and the inspector did not charge any delay for the miring (Deft's. Ex. Y; R. 24, 25, 33).

Petitioner signed the change orders and release because he had to have pay for his men and for material and the officer in charge notified him: "No change order no money" (R. 37). Respondent refused to make payments unless petitioner accepted them in full, over petitioner's protest (R. 26, 27). Petitioner repeatedly complained of conditions and the Government agent's arbitrary action and asked for an extension of time and additional compensation, and appealed to the Secretary of the Navy (Deft's. Ex. H; R. 26, 27). The Government took no action, but 35 days after the work was completed refused to make payments unless accepted in full for specific work listed under the contract and the Change Orders, in which delays were not mentioned (R. 26, 27; Deft's. Ex. B, C, and G).

II.

The Court of Claims erred in making the following special findings of fact:

(1) The party proceeded to the site of each tower and viewed the existing conditions (Court's Special Finding No. 4, p. 4; R. 14).

(2) All the sites had sufficient access thereto for inspection was made possible by a trail cut through the grass by a native using a machete (R. 15).

(3) The contractor based his bid on the inspection thus made by his representative. He made no application to defendant's officers for further information. Defendant's officers made no representation to the contractor or his representative that the site was otherwise than it appeared to be and concealed no material fact from either of them (Id.).

(4) The buckling of the sheet piling at Tower Site 6 could have been avoided by a more efficient form of cofferdam, and the use of shoring (No. 5; R. 15).

(5) The miring of petitioner's shovel delayed the progress of the work (R. 16).

(6) The contractor consumed more time in prosecution of the work than estimated by him, by lack of equipment adequate for the conditions actually encountered, breakdowns in equipment, and the failure to prosecute the work more vigorously. The delays experienced threw the work into the dry-weather period, during which time the work could be done faster than during the rainy season (Id. No. 6; R. 16, 17).

(7) For all delays occasioned by the Government there has been given the contractor adequate extension of time

for performance, together with fair and reasonable compensation (Id. No. 7; R. 17).

(8) There is no proof that the decision of the Secretary of the Navy, on appeal, was mistaken in matters of fact (No. 9; R. 17).

III.

The Court of Claims erred in making the following conclusions of law:

(1) Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover and its petition is therefore dismissed.

Judgment is rendered against the plaintiff for the cost of printing of the record herein, the amount thereof to be ascertained by the clerk and collected by him according to law (R. 17, 18).

IV.

The Court of Claims erred in making the following findings in its opinion:

Plaintiff made its own examination of the site along with other bidders and had full opportunity to become acquainted with all the conditions. No information in the possession of the Government was withheld from the contractor who did not seek during the execution of the contract any further information from the defendant but relied entirely upon its own inspection (R. 20, 21).

The Commissioner has found and, after a thorough investigation of the record, we are convinced that there was no misrepresentation as to the condition of the site and that the Government furnished the plaintiff with all the information in its possession which had any bearing on the contract. Whatever changes were made, due to sub-surface

conditions, were carried out in strict conformity with the terms of the contract, a fair and reasonable compensation for the extra work was allowed, and a reasonable extension for the completion of the contract was made. The evidence shows that plaintiff was a member of the Boards which passed on these changes and agreed that they were satisfactory both as to amounts and to extension of time (R. 21).

(2) There is no showing that there was any duress of coercion brought to bear on the plaintiff to execute this release but it was executed in due compliance with the terms of the contract as above set forth. This release is binding on the plaintiff (R. 21).

(3) The record fails to disclose that there are any misrepresentations on the part of the defendant as to the conditions to be encountered at the site or any sub-surface conditions or delays for which the plaintiff was not fully compensated and a reasonable extension of time for the completion of the contract granted. A careful perusal of the evidence shows that the terms of this contract were faithfully and carefully preserved and every step taken by the Government was in compliance with the terms of the contract (R. 22).

(4) The delays which were not compensated for were those arising from the failure of the plaintiff to expedite the work by having adequate equipment and a vigorous prosecution of the work by an adequate crew of workmen (R. 22).

The facts show that the delays were caused by the plaintiff and the defendant was in no way responsible for any delays for which liquidated damages have been assessed (Id.).

There can be no recovery on the part of the plaintiff and its petition is dismissed. It is so ordered (Id.).

Reasons for Granting the Writ.

(1) The Court of Claims failed and refused to make petitioner's requested Special Findings of Fact which are upon vital questions and are indispensable elements in the case, and not in dispute, in disregard of Rule 41 of the United States Supreme Court. The requested Special Findings of Fact are set out under Point I in the Specification of Errors to be urged, and are sufficient to entitle petitioner to judgment under the authorities of this Court, and all other authorities, as follows:

(a) The specifications provided that there would be no artificial obstructions on the site (Plf's. Ex. 2, p. 6), but respondent created an artificial obstruction in providing an inadequate culvert, which backed water up and flooded the site, and made work far more difficult and expensive, and took much more time than it would have been the case without floods, as shown under Point I-10 above. The failure to find these important facts, and to hold that there was a breach of warranty and misrepresentation by respondent, which entitles petitioner to recover his damages of $26,796.54 (R. 24-27) is in conflict with the decisions of this Court (*U. S.* v. *Esnault-Pelterie*, 299 U. S. 201; *Hollerback* v. *U. S.*, 233 U. S. 165; *U. S.* v. *Spearin*, 248 U. S. 132, 134, 135; *U. S.* v. *Atlantic Dredging Co.*, 253 U. S. 1, The Court of Claims; *Rust Engineering Co.* v. *U. S.*, 86 Ct. Clms. 461; *Sobel* v. *U. S.*, 88 Ct. Clms. 159, and the Federal Circuit Courts; *Monroe Contracting Co.* v. *Westchester County*, 94 F. (2d) 580, 584; *Passaic Valley S. Comrs.* v. *Holbrook Etc. Co.*, 6 F. (2d) 721).

(b) The contract included certain maps and drawings showing drainage ditches for the site (Plf's. Ex. 5; Deft's. Ex. T), which the petitioner had the right to assume would be sufficient to drain the site, and petitioner was further misled by Fogg's telling him (to induce him to believe that

the site would be adequately drained), as Fogg himself testifies, that the Panama Canal was extending its drainage system there (R. 36, 43). The drains proved utterly inadequate to drain the site as shown under Point I-10 above. The failure to find this material fact, and to hold that petitioner is entitled to the said damages he suffered as a result of respondent's misrepresentation and warranty, is in conflict with the decision of this Court, as shown by the authorities set out above, and with the decisions of the Federal Circuit Courts of Appeals, and those of the State Courts of last resort (*Horgan* v. *Mayor,* 160 N. Y. 516, 522; *Norrington* v. *Wright,* 115 U. S. 188).

(c) The lengths of 91 out of 180 piles were erroneously estimated in the specifications (R. 31). Piles at three sites had to be exchanged (R. 25). At one site, they were so much longer than estimated that new piles had to be ordered from the United States, which did not arrive till six weeks after the completion date (R. 26, 31, 12). The exchange of piles was over swampy ground, and took a long time, and was difficult and expensive (R. 25). These changes owing to the unforeseen difficult nature of the soil to work in resulted in and amounted to a complete alteration and abandonment of the contract, and entitled petitioner to recover on a *quantum meruit* the cost of work less the payments made, long unpaid $26,796.54 (R. 27), and the refusal of the Court below to grant this relief was error, and in conflict with the prior decisions of the Court below and the decisions of this Court, as cited above.

(d) Fogg, respondent's officer in charge, failed to disclose the difficult nature of the site (which was well known to him), and respondent likewise misrepresented it, to petitioner's loss (R. 23-26, 40, 43): Fogg knew that the site would collect water and be flooded (R. 39, 40, 43), and would be difficult to work in (R. 43) with inadequate

drainage (Id.), and that the ditches were to take off flood waters as well as they could, and prevent earth slides, which had frequently occurred (R. 40), but he did not tell the bidders any of these facts, but testified that he ventured no information as to whether the ditches were adequate (R. 27, 39, 43), and that if the bidders wanted information as to the rainfall to determine the adequacy of the ditches, they could get it themselves as best they could (R. 41); that he took the bidders to the site so that they could look and form their own conclusions, as to whether the drainage system was adequate, that he felt responsible for showing them the sites and conditions, but not for any matters of their own judgment (R. 40), the inspection trip was made before the rainy season (R. 14, 28, 29) on a trail over high ground through dense, thick grass 6 to 8 feet high (R. 35, 42), making it impossible for the bidders to see enough to form a dependable judgment, all in violation of a provision in the contract that

> "They" (the bidders) "will be furnished with such additional information as is available by the local Government representatives" (Par. 7, Gen. Provs.; Plf's. Ex. 3).

And respondent showed petitioner a map from which it could not be seen that the site was marshy and swampy (Plf's. Ex. 5), although it had made and had one which showed this condition (Plf's Ex. 6). This breach of the contract and the failures to disclose material facts rendered respondent liable for the loss of $26,796.54 (R. 27) petitioner suffered, and the refusal of the Court below to grant judgment for this amount was in conflict with the decisions of this Court, and of the Court below, as cited above.

(e) The contract provides—

> "* * * the contractor" (shall not be) "charged with liquidated damages because of any delays in the

completion of the work due * * * floods * * *." (Contract, Art. 9; Plf's. Ex. 1).

It is undisputed that there were floods throughout the progress of the work which hindered and delayed the work, and made it nearly impossible, as fully described in the Specification of Errors, Point I, Nos. 7 to 10 inclusive, yet the Court below refused to find that the contract contained the above quoted provision, and in disregard of it, and of the fact that there were continuous floods which hindered and delayed the work charged petitioner with $3,950 liquidated damages (Court's Finding Nos. 8, 9; R. 17), which holding is in conflict with the above quoted provision of the contract, and the decisions of this Court and of the Court below, which hold that if only part of the delays were caused by respondent (and here respondent caused them all), it could not assess liquidated damages against petitioner (*U. S.* v. *United Eng. Co.*, 234 U. S. 236; *Standard Steel Co.* v. *U. S.*, 67 Ct. Cls. 445; *Greenfield Tap & Die Corp.* v. *U. S.*, 68 Ct. Cls. 61; *Christensen Constr. Co.* v. *U. S.*, 72 Ct. Cls. —; *Bethlehem Steel Co.* v. *U. S.*, 75 Ct. Cls. 845).

(2) The Court of Claims erred in making the Special Findings of Fact set out under Point II of the Specification of Errors, all of which are plainly without support in the evidence. These findings are in conflict with the decisions of this Court in *General Talk. Pictures Corp.* v. *Western El. Co.*, 304 U. S. 175, 178.

Conclusion.

The Findings of the Court of Claims set out in Point II of the Specifications of Errors to be urged, are not the ultimate facts. Such facts are set out as errors for failure to find under Point I. As respondent put in issue all the

allegations of the complaint (R. 1-11) by its general traverse (R. 11), the findings in order to be sufficient to sustain judgment must specifically decide all the questions, which are mainly,—

(a) Did petitioner encounter artificial obstructions, contrary to Section 2 of the specifications, by respondent's insufficient and inadequate culverts and drainage ditches which backed water up and flooded the site?

(b) Was petitioner entitled to rely upon and to assume that the drainage ditches shown on the maps respondent furnished him previous to his bid (Deft's. Ex. T; Plf's. Ex. 5), and pointed out to him by Commissioner Fogg as being extended, were sufficient to drain the site?

(c) Was petitioner released from paying liquidated damages on account of the floods under Article 9 of the contract, and because of the delays caused by respondent?

(d) What was the necessary cost expended by petitioner? What amount is petitioner entitled to recover?

The Court of Claims is also required but failed to include circumstantial facts sufficient to warrant its conclusion in respect to the main issues.

The failure to find such ultimate and circumstantial facts in respect to the main issues is in conflict with Rule 41 of this Court, and *U. S.* v. *Esnault-Pelterie,* 299 U. S. 201.

The failure of the lower Court to make specific findings upon the main issues entitled petitioner to a Writ of Certiorari, as this Court may now, under the Act approved May 22, 1939, amending subsection b of section 3 of the Act of February 13, 1925 (43 Stat. 936, 939, c. 229; U. S. Code, Title 28, Sec. 288b), examine, analyze, and compare the circumstantial facts found, with the evidence brought up, to

ascertain whether as matter of law petitioner is entitled to judgment.

For the reasons stated, it is respectfully submitted that this petition for writ of certiorari should be granted.

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